



POLICE DEPARTMENT

April 17, 2009

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Jared Santangelo  
Tax Registry No. 907263  
Intelligence Operations and Analysis Section  
Disciplinary Case No. 83879/08  
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The above-named member of the Department appeared before me on December 3, 2008, December 4, 2008, and December 9, 2008, charged with the following:

1. Said Police Officer Jared Santangelo, assigned to the 83 Precinct, while on-duty at or about 1200 hours on October 9, 2006, at Dekalb Avenue, between Bushwick Avenue and Evergreen Avenue, Kings County, did use excessive force against an individual known to this Department, to wit: said Officer slapped said individual across the face.

PG 203-11 – PAGE 1 – PARA 2      FORCE

The Department was represented by Nancy Lichtenstein, Esq., Department Advocate's Office, and the Respondent was represented by Craig Hayes, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Oscar Pena, Steven Wilson and James Foster as witnesses. The Department also introduced the Civilian Complaint Review Board (CCRB) statements of [REDACTED] and [REDACTED]

Oscar Pena

Pena was 28 years old. At the time of trial, he was incarcerated in state prison for a Robbery in the Third Degree conviction and was serving a 3 ½-to-7 year sentence. He had misdemeanor drug charges on his record, as well as a robbery conviction in 2004 for which he served one year.

Pena testified that on October 9, 2006, around 12:00 p.m., he was outside [REDACTED] Avenue (Brooklyn). Pena was waiting for his landlord "from the building," whom he knew as "[REDACTED]" ( [REDACTED] ). Pena was with his brother [REDACTED] and one of their co-workers, Steven Wilson.<sup>1</sup> Pena, [REDACTED] and Wilson got into [REDACTED]'s car. Pena was going to one of [REDACTED]'s buildings to perform construction work. In Pena's pockets were a shaving razor and half a blunt, a cigar filled with marijuana. Pena testified that [REDACTED] was in the front passenger seat. Pena was sitting behind [REDACTED]

Pena stated that he was 5'11" in height and weighed about 180 pounds in October 2006.

Pena testified that [REDACTED]'s vehicle was pulled over by the police. The officers had their weapons "drawn" and told the occupants to exit the car. Pena testified that they refused because

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<sup>1</sup> The full names of the persons involved were given by later witnesses or were gleaned from CCRB interview transcripts in evidence.

they “didn’t know what we were being stopped for.” But, Pena detailed, the officers “demanded” that they come out, so they did. Pena testified that the officers searched his pockets and found the razor and the blunt. After the officer that searched his pockets placed the blunt on top of the car, Pena reached over, grabbed it and swallowed it.

Pena testified that the officer that searched him “smacked” him with the officer’s right hand on Pena’s left cheek. Pena believed the officer’s fist was opened. Pena was not injured, and was not taken to the hospital. He was taken to the precinct and “went through the bookings.” He believed he was arrested for destroying evidence, and probably pleaded guilty in that case. He did not call the CCRB to make a complaint or file a civil action regarding this matter. Pena believed his brother, [REDACTED], contacted the CCRB.

On cross-examination, Pena concurred that he was asked to place his hands on top of the car when he was “taken out of the car.” He was searched on the passenger side of the vehicle. When Pena grabbed the blunt, he believed [REDACTED] was on the driver side. He believed Wilson and [REDACTED] were by the trunk.

Pena stated that he swallowed the blunt because he did not want to get arrested and return to jail.

Pena testified that the robbery conviction for which he was presently incarcerated also contained a grand larceny charge and was “with somebody else.” He was found guilty after trial. He denied robbing anything, but was nonetheless convicted of stealing money by a strong-arm robbery. Pena agreed that Department witnesses testified against him in the trial, and he contended that they lied. He denied, however, that he did not “like the police very much,” saying that he did not “have a problem with the officers.” He stated that “they are doing their job. They are doing what they got to do,” but agreed that “[t]heir job is not to lie.” Pena asserted

that he had “no ill will towards the police for lying to put you away for three-and-a-half to seven years.”

Pena testified that the 2004 robbery was also a strong-arm robbery and was committed with an accomplice. The original sentence was a split sentence of jail and probation. He admitted that he violated the probation because he never reported to the Probation Department. He got arrested again, and was re-sentenced to a year in jail.

Pena testified that he had several drug possession “charges” in the past. These were for possessing powder cocaine (Criminal Possession of a Controlled Substance in the Seventh Degree) and marijuana. Pena admitted that he did possess these drugs. He admitted using drugs when he was “on the street,” including cocaine, marijuana and ecstasy. In 2006, he had been smoking marijuana every day. He first stated that he had done so for about a year, then clarified that when the incident occurred, he had been smoking daily for about a month, noting that he had just been released from Rikers Island. He admitted that he was smoking marijuana at home the morning before the instant incident, and that he was still under its influence when the incident occurred. He agreed that marijuana affected his memory when he was actually smoking it.

Pena denied that he actually had a crack pipe, not a blunt, in his pocket on the day of the incident. He denied that he ever used crack cocaine or that there was a crack pipe on the hood of the car. Pena agreed that when he pleaded guilty to tampering with evidence, the judge or the prosecutor asked him about the facts of the case. He stated that he did not remember whether the charge read that he allegedly tampered with evidence “by breaking a glass pipe with crack,” stating that he did not recall “what was told to me in court.” Pena did not believe that the judge or prosecutor asked during the allocution whether he broke a crack stem.<sup>2</sup>

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<sup>2</sup> After Pena testified, counsel for the Respondent stated that the conviction was actually for Attempted Tampering With Physical Evidence (Penal Law §§ 110 / 215.40), a misdemeanor.

Pena agreed that he remembered some things about these matters “well and some things not so well.” He stated that the incident “was physical, you know,” as opposed to “what was being said at court that day.”

Pena testified that he was up for parole in March 2009, and said that he had been seen by the parole board already. He denied that anyone from the Department offered or promised to write a letter on his behalf to the board in consideration for his appearance at trial.

Steven Wilson

Wilson testified that on October 9, 2006, around 12:00 p.m., he was at [REDACTED] Avenue in Brooklyn. It was sunny out. Wilson was with his boss, [REDACTED], and Pena. Wilson met Pena and [REDACTED] “a while back when I was homeless sleeping in the buildings.” He had become homeless at the age of 13, and currently lived at [REDACTED] in a back apartment. Pena lived in a separate building in the same “private complex.”

Wilson stated that he was waiting with the others to do some work renovating a basement. They were picked up in a car by their boss [REDACTED]. Wilson was sitting behind the driver’s seat, [REDACTED] was in the passenger seat, and Pena was behind [REDACTED].

Wilson testified that “about a block or two away from the house,” [REDACTED]’s car was pulled over by the police. One police car drove past them and parked in front of them, and another parked behind them. The officers told [REDACTED] to take the keys out of the ignition, which he did. They removed each occupant from [REDACTED]’s car.

Wilson testified that Pena was searched twice. The second time, Wilson was standing next to the driver’s seat, and Pena was standing on the rear right of the car. The officer searching Pena “went down low,” and “came back up with a crack pipe.” Wilson “assumed he pulled it out

of his sock.” When the officer placed it on top of the car, Pena grabbed the pipe and threw it against the wall. The officer looked back to where Pena threw the pipe, paused, “came back around,” and “smacked” Pena with the back of his open hand using his arm “say from the front like a back smack.”

Wilson testified that when [REDACTED] telephoned “the police officers dressed in uniform,” the officer grabbed [REDACTED]’s phone and told him to “shut the fuck up.” “We asked” why the officer slapped Pena, but the officers “were cursing us out.” Pena was handcuffed and arrested. Neither Wilson nor [REDACTED] was arrested.

On cross-examination, Wilson testified that Pena’s hands were by his sides right before he grabbed the pipe. The officer was not frisking him at this point. He was standing behind Pena a little to Pena’s left. Pena grabbed the pipe quickly with his left hand, turned his entire body around, and “slam[med]” it against the wall. Pena was about six to eight feet away from the wall. He did not reach the wall with his hand; he threw the crack pipe and it broke.

When asked whether there was a blunt on top of the vehicle in addition to the crack pipe, Wilson said, “No – yeah, I think so. I don’t really know, you know, I am not going to say yes or no. Could have been.” The only thing Wilson saw Pena throw was the crack pipe. He never saw Pena “put any blunt” into his mouth. Wilson was watching Pena the whole time.

Wilson stated that Pena was not scheduled to work with “us,” but “wound up tagging along.” Pena did not appear under the influence of drugs that morning, and Wilson had not observed him smoking marijuana or smelled its smoke on him. Pena appeared “pretty normal” to Wilson.

Wilson stated that the officer was facing Pena when he slapped him. Wilson did not know what the officer was doing with his non-slapping hand. Wilson agreed that after the

officer struck Pena, the officer pushed him with his other hand on Pena's body "to get control of him over the car," turning him over and handcuffing him. Wilson believed the officer grabbed Pena by the body, and did not believe it was the head "because I was looking."

Wilson testified that the officer hit Pena in the left cheek, and that the officer used his right hand. When counsel asked if Wilson's testimony was that the officer "used the back of his right hand and came around this way to hit the left side of Pena's face," Wilson admitted, "All right, look, it could have been the right or left hand he used, all right." Wilson then agreed that the officer could not have hit Pena "with that hand on the side the face. It was a mistake that I said he hit him with that hand." He clarified that the officer used the back of his left hand to hit Pena on the face. Wilson agreed that "immediately after that, he was spun and placed on top of the car."

Wilson "kn[e]w" that the officer slapped Pena, noting, "I seen it with my own eyes." Wilson was "[p]ositive" that the officer could not have used his left hand, "made contact with the right side of his face in order to turn him around and on top of the roof of the car."

Wilson testified that he was not handcuffed when he watched what occurred between the officer and Pena. Bo was next to the driver's door and Sanchez was "kind of" in front of the vehicle "next to where the cell phone was placed."

Wilson testified that after he became homeless, [REDACTED] took him in and gave him a place to live. Wilson "kind of went back to the foster care agency" that he was in originally, and left again. [REDACTED] was a building superintendent "basically," so Wilson would stay in those apartments. [REDACTED] said that he was friends with Pena, and agreed that Pena and [REDACTED] helped him when he was "in a pretty bad situation." Wilson agreed that he felt loyalty toward Pena, noting, "It's a friend of mine."

James Foster

Foster was employed as a cleaner for the New York City Education Department, and had been so employed for 18 ½ years. He worked at a high school at 797 Bushwick Avenue in Brooklyn, at the corner of DeKalb and Bushwick Avenues. Foster clarified that the nearby streets were Bushwick and Evergreen Avenues, with DeKalb “in the middle.”

Foster testified that on October 9, 2006, around 12:00 p.m., he was on the third floor of the school washing the windows. It was “nice and sunny that day.” At one point, Foster was looking out one of the windows, which was about four feet wide and six or seven feet tall. He was “close up” on the window. He saw that the police had pulled over a car. The officers told “the guys, . . . like two Spanish in the front and two black in the back,” to exit the car. To Foster, this “was just really like a normal search.” After the car and occupants were searched, “one Spanish kid” was talking to someone on the phone. “Eventually, they told him to get off the phone,” and “eventually” he did. Foster believed there were five police officers at the scene.

Foster did not know the occupants of the car that was stopped, and at the time of trial had not seen them since. He had never seen the officers before. Foster testified that besides himself, there were “a couple of other people around.”

Foster testified that after the searches, items were removed from the occupants’ pockets and placed on the hood of the car. Foster said that “one of the Spanish kids” took something, threw it against the wall, and it shattered. Foster believed the item might have been a cigarette lighter or a cell phone.

Foster testified that “this cop slapped the side his head . . . and turn him around and jack him over the car just about.” Foster said that the officer “pulled him down . . . He was patting



him on the shoulder like he was saying, you know, okay, calm down, take it easy.” The officer then walked the thrower to the rear of the car.

Foster testified that the officer who did the frisking was a smaller officer, and a different person than the officer who slapped the man. However, Foster later stated that the officer “didn’t get a chance to pat him down,” and was actually searching someone else, when “the guy throw the lighter or the cell phone,” and the “big officer” slapped him then grabbed him by the collar.

Foster testified that the officer who slapped the man used an open right hand against the cheek of his face.

Foster testified that the man that threw the object was handcuffed and placed in a vehicle. Foster came downstairs as the police were leaving. He spoke to a “guy in front of the car” that “had these guys working for him in this building, his apartments. They were going to another apartment to do some work.” Foster said that the “Spanish kid who was driving, he was asking” if Foster, “since I observed it, would I come down if they had to go to court to trial. I told him yeah.” Foster said that there was a female witness to the incident, but she “told them she didn’t want to come forward. . . . Right in the area she live, but she didn’t want to come forward.”

On cross-examination, Foster stated that he had just gotten to the room he was cleaning when the incident occurred. He agreed, therefore, that when he looked out the windows, they were still dirty. Although it was sunny out, Foster could see as well as he could in the Trial Room. He noted that there was demolition occurring across the street, “so the demolition was covering the whole street.” There was sun on “some of the car, half of the car.”

Foster testified that the incident took about twenty minutes, possibly a little longer. The street in question had one lane in each direction. This incident took place on a Saturday, and during the weekend, Foster said, DeKalb Avenue was not that busy. “This happened to be on a

slow Saturday.” He testified that perhaps one or two cars passed by while the incident happened. The two police cars and the citizens’ vehicle were pulled over far enough that traffic could pass, albeit at slower speed.

Foster described the size of the car’s occupants as “narrow and small.” Foster stated that it was while the second of the four occupants was being searched that the person threw the object. The person throwing the object had not yet been searched. This person was facing the vehicle as well as Foster. The wall was behind the thrower.

Foster testified that the person threw the object, and turned right back. He did not place anything into his mouth. The officer was “on an angle on his right side. . . . No more than two feet away. Very close, right up on him.” The officer was “shocked because he threw it against the wall. Like, what? And he just smacked.” When the officer smacked the man, “it turned his whole face.” The officer’s palm hit the “side of his head and back.”

Foster asserted that the officer then grabbed the man and hoisted him into the air, “high up over the car. . . . straight up over the car just about.” Foster agreed that this occurred before the man was handcuffed, and that the man was facing the officer while aloft.

Foster denied giving a statement to the CCRB that the officer slapped the man “and then cuffed him right after that.” Foster also stated, “Really, I don’t know why I didn’t mention” to the CCRB that the officer lifted the man in the air.

Foster estimated that counsel for the Respondent was about 6’2” or 6’3”. He agreed that he told the CCRB that the officer was 6’4” to 6’5” and about 350 to 375 pounds. Foster believed that the Respondent was also about that size. He then stated, about the slapping officer, “At first I tell him really had to be around 6’5”, 6’6”. He was a big cop. He was bigger” than counsel and a little taller as well.

CCRB Interview of [REDACTED]

CCRB Investigator Poellot interviewed [REDACTED] over the telephone on October 17, 2006. The tape of the interview was taken into evidence as Department's Exhibit (DX) 2, and a transcript as aid to the Court as DX-2a.

[REDACTED] told the investigator that on October 9, 2006, he was waiting outside his home at [REDACTED], in order to go to work. He was with "my brother [Pena] and another kid." [REDACTED] referred to this third person (Wilson) as Steven or "Steveo" (pronounced "Steve-O").

[REDACTED] said that the three were picked up by [REDACTED]'s landlord and boss ([REDACTED] see *infra*). Wilson also worked for [REDACTED]. [REDACTED] was sitting in the front passenger seat, Pena was behind him, and Wilson was behind [REDACTED], the driver.

[REDACTED] said that after about two blocks of driving, on DeKalb between Evergreen and Bushwick Avenues, two police vehicles pulled them over. One car "bumped" [REDACTED]'s car and the other went in front of him.

[REDACTED] stated that there were four police officers, three white males and one "Spanish" female. The police asked for [REDACTED]'s license and registration, which [REDACTED] handed over. The officer did not look at the paperwork, but placed it on top of the car. The officer also told [REDACTED] to take the keys out of the ignition. [REDACTED] did so, and handed the officer the keys. The officer placed the keys on top of the car, and told [REDACTED] to step out of the car. [REDACTED] asked, "for what?"

[REDACTED] stated that the officers "did not have badges, . . . they had like . . . it was like s[e]wed onto their chest. They had bullet proof vests, they had guns, they are cops, but they are

like narcotic cops or . . . Detectives, they are not blue and white cops." The officers were driving unmarked vehicles, and [REDACTED] and the others took down the license plate numbers.

[REDACTED] told the investigator that when one officer opened [REDACTED]'s door, another opened the back door. [REDACTED] said, "oh shit, they're pulling us all out of the car, what the fuck did we do?" [REDACTED] said that he did not know what was going on and called 911. An officer opened [REDACTED]'s door, grabbed the phone out of his hand, shut it and threw it. The officer pulled [REDACTED] out of the vehicle, and [REDACTED] said, "what the fuck are you pulling me out for? Like what's going on? You can't do that. . . . Why did you pull us over from the beginning?" The officer said, "Get out the car, shut up," searched [REDACTED] and told him to stand behind the car, where the other three occupants were standing.

[REDACTED] said that when the officer searched Pena, "he put a crack pipe on top of the car . . . My brother had a crack pipe on top of the car." Pena and [REDACTED] saw the crack pipe. [REDACTED] thought that Pena "got embarrassed that we seen it or whatever," grabbed it from the top of the car and "flattened it on the floor," making a sound. According to [REDACTED] neither he nor [REDACTED] knew that Pena had been using drugs.

[REDACTED] asserted that an officer ran from around the car, exclaimed, "you stupid crack-head motherfucker," and slapped Pena across the face "real hard." They began "calling him you fucking crack head, we could have shot you this, that. . . . [T]hey were like real reckless, alright." The officer that slapped Pena was "a heavy set guy, baldy, baldy, baldy no type of hair on his head. That guy is a big fucking guy." [REDACTED] was "surprised he didn't knock [Pena] out with that slap." The slap "must have left him dazed out, but nobody was injured." [REDACTED], who stood at 6'4", was taller than this officer, but [REDACTED] varied in his estimation of the difference by between one to eight inches. This was the same officer that took [REDACTED]'s phone.

Pena was handcuffed and arrested. [REDACTED] asked the officer why he slapped Pena. "Okay, he cracked it, you all did whatever you could. You're going to arrest him regardless of the point, you didn't have to slap him."

After checking the identities of [REDACTED], [REDACTED] and Wilson, one of the officers told them that the police were driving around the neighborhood, looking for a person with a gun, and "you all fit the description." This was the reason they got pulled over and were not given any "information" as to why.

[REDACTED] asserted that a group of uniformed officers was watching from the corner, but "[n]ot once did they walk up to us." He told the investigator that there were witnesses to this incident, including teachers and janitors from the school across the street from where it happened. One of the janitors approached the scene once a captain from the 83 Precinct responded. The janitor said "basically yo, you go to court or whatever I'll go to court with you this, that talking." The janitor told that captain what he saw. The captain said that they "could go to the 83<sup>rd</sup> Precinct you could file a complaint, do this, do that."

[REDACTED] stated that they went to the 83 Precinct and tried to file a complaint, but "they denied everything" and insisted, "They probably had a reason why to pull you over." The personnel at the 83 Precinct said "basically oh, well, take this number down, call, make a report, there's nothing we can do."

CCRB Interview of [REDACTED]

Poellot interviewed [REDACTED] in person on October 26, 2006. ([REDACTED] answered the phone when Poellot first telephoned [REDACTED] and related that he was a witness to the events

as well.). Tapes of the interview were taken into evidence as DX-1 and DX-3, and a transcript as aid to the Court as DX-1a.

██████ described the events of October 9, 2006, at approximately 12:15 p.m., in the area of DeKalb and Bushwick Avenues, Brooklyn. ██████ owned a house on ██████. He went to pick up Wilson (whom ██████ called "Steve O") and ██████ (whom ██████ called ██████). He also picked up Pena.<sup>3</sup> ██████ waited about 10 to 15 minutes before everyone was ready to go. ██████ entered the car first, followed by Wilson. They then waited for Pena.

When ██████ had first bought the house, Pena and ██████ were living there. They were not paying their rent, but ██████ resolved the rent dispute by employing them to do construction on another property he owned. Wilson also stayed there, so ██████ "wanted to work something out and make them pay rent and do something." ██████ clarified that Wilson worked for ██████.

██████ stated that ██████ was in the front passenger seat, Wilson was in the left rear, and Pena was in the right rear. As ██████ was driving past Bushwick Avenue, he was stopped by two black Chevrolets, both police vehicles. One of the cars was in front of ██████ and the other was to his side, in order to block him from going anywhere. The location was about two blocks from where ██████'s ██████ house was. ██████'s windows were not tinted, and there was no music playing. He knew that the driver side window was down.

Several police officers emerged, and four approached ██████'s car. One was a muscular white male with curly hair. There was also a female officer. One officer was behind ██████'s car, and another, on the passenger side, was "big, tall, chubby, bald."

██████ said that the curly-haired officer asked for his license, insurance, registration, and the ignition key. ██████ gave the officer these items, and the officer put them on top of the

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<sup>3</sup> ██████ believed ██████'s brother was named ██████ or ██████.

car and told [REDACTED] to step out. He did so, and the officer searched him but did not find anything. He touched the outside of [REDACTED]'s pockets only; he did not reach inside. The other occupants got out and were searched as well. [REDACTED] was "kind of nervous" and asked the female officer, "what's going on? What did I do?" The passenger compartment of the vehicle was searched, including the center console, but not the trunk.

[REDACTED] told the CCRB investigator that while he was "in the back," he "heard like kind of fight because" Pena "threw something and the chubby one smack him." [REDACTED] was focused on the female officer "and the cop that was in front of me. It was like I was at the angle."

[REDACTED] did not "really pay attention and after I, I just glance a little bit and I see like of confrontation between" Pena and "the chubby cop." [REDACTED], however, "really didn't know the story until later on" when [REDACTED] told [REDACTED] "what was going on."

[REDACTED] said that Pena threw something that bounced on the wall" and I don't know what happened after that." [REDACTED] did not hear anything break or shatter. "[T]hey" did not want to tell [REDACTED] what the thrown object was, "but they said it was a piece of something, I don't know what was it."

According to [REDACTED], the officer smacked Pena on his face with an open fist. He believed it was the left side of Pena's face. [REDACTED] did not hear the officer say anything to Pena. Pena "went crazy talking . . . you know how you react to something that you have no reason why they are doing it?" [REDACTED] described Pena as moving his hand and raising his voice, but also as "mumbling," saying, "It's not right, it's not right."

When asked by the investigator how Pena reacted after being "slapped," [REDACTED] said, "He didn't have time to do anything. After they slap him" he was handcuffed by the chubby

officer and the other white male officer. There was a small struggle to handcuff Pena; he was moving, and they held him and pushed him onto the car before cuffing him.

██████████ stated that after Pena was handcuffed, he was taken to the police vehicle that was behind I ██████████'s car. Only Pena was arrested. One of the white male officers approached ██████████ and said "you know why I stopped you. And I said I don't know. Because like you guys look like somebody that just now did something . . . Matched the description." After the incident, ██████████ and others went to the precinct to try and find out "what was going on."

██████████ stated that S ██████████ had been using ██████████'s phone while they were driving. ██████████ later told ██████████ that he was on the phone attempting to call 911 when one of the officers grabbed the phone from him and threw it to the ground. ██████████ said his phone was undamaged, but then stated that because of his frustration and upsetness that day, he "didn't really pay attention" to whether it or ██████████'s phone was damaged.

██████████ said that there was another witness to the incident. ██████████ did not speak to him, but ██████████ did. The witness said that he was watching from the school and saw the officer slap Pena on the face. The witness said "he's ready to testify . . . But he was talking loud."

#### The Respondent's Case

The Respondent testified on his own behalf.

#### The Respondent

The Respondent had been a member of the Department for almost 15 years. He was first assigned as a police officer to the 83 Precinct, and worked there for about 14 years before moving to the Intelligence Division. He worked patrol, conditions, and in the Street Narcotics



Enforcement Unit (SNEU). He had made around 350 to 400 arrests, many narcotics-related. He stood at about 5'11", and weighed about 265 pounds at the time of the incident.

On October 9, 2006, the Respondent was assigned to a SNEU field team. After an observation was made by the observing officer, the Respondent and others apprehended "the person who was observed doing what they were doing."

The Respondent testified that the SNEU team made a car stop involving Pena. The observing officer had radioed "a physical description like a clothing description" of an individual and a vehicle. The individual was said to possess a crack pipe.

The SNEU team stopped the car on DeKalb Avenue between Evergreen and Bushwick Avenues. There were four occupants, and all were removed from the car. The rear passenger, Pena, matched the observing officer's clothing description. Pena "was asked" to step out of the vehicle, which he did. The Respondent took Pena out of the car and began to search him. To do this, the Respondent had to "[k]ind of take half a step back and kind of squat down with one foot to the rear."

Pena's hands were placed on the roof of the car. He began at Pena's head and worked his way down. He stood behind Pena and a little to his right. The Respondent "recovered" a crack pipe in one of Pena's pockets. The Respondent placed the pipe on top of the car and resumed his search, going down to Pena's feet.

The Respondent testified that he was "kind of crouched down," frisking the lower half of Pena's body. His head was about at Pena's waist and his hands were on Pena's "pockets, on his legs, groin." The Respondent observed the upper part of Pena's body turn "pretty quick" toward his left. The Respondent "kind of jumped to my feet," grabbed "like his mid section" or "belly" with the Respondent's left hand, pulled Pena toward him, "forced my right hand to the back or

side of his head,” and quickly “forced him down to the car.” He was unsure exactly what side of Pena’s head he grabbed, but knew it was not his cheek.

The Respondent testified that he handcuffed Pena, and he was compliant after that. Pena was placed in one of the police vehicles to be taken to the precinct. From the time Pena started turning until he was “back onto the car” was perhaps “a second or two.” The Respondent did not need assistance from the other officers to control and cuff Pena.

The Respondent believed the force he used was necessary. He asserted that he was unsure if Pena “was trying to run, if he was reaching for something. . . . I knew he was moving too fast for me to be in a safe position where I was.” He did not know what Pena was doing except that he was turning. “[B]ased on [his] conversations later on with the other officers and what [he] had heard,” the Respondent realized that Pena had thrown or swatted the crack pipe to the wall or floor, and the pipe broke.

The Respondent denied grabbing Pena and lifting him into the air as described by Foster. He had never “lifted somebody up uncuffed like that.” This would have been “tactically unsafe” because the person would have been facing the Respondent. “It leaves his hands wide open to either choke me, or grab me, or whatever.”

The Respondent testified that Pena never accused him of slapping or hitting him. Pena did not appear injured and did not ask for medical assistance.

On cross-examination, the Respondent maintained that he did not notice that the crack pipe was no longer on the roof of the car until after Pena was handcuffed. The pipe was not vouchered.

FINDINGS AND ANALYSIS

In this case, the parties disagree over the nature of a brief action taken by the Respondent during a car stop. The Respondent's SNEU team pulled over a vehicle driven by [REDACTED] [REDACTED] after a SNEU observation was made of Oscar Pena. All of the occupants were removed from [REDACTED]'s car and searched. When Pena was searched, the Respondent found either a crack pipe or marijuana blunt and placed it on top of the car. Pena attempted to get rid of this evidence, either by swallowing the blunt or throwing away the pipe.

The Respondent then made physical contact with Pena, but the parties disagree as to whether this was excessive force or proper police action. The Department contends that the Respondent was angry at Pena for destroying evidence and slapped him in the face. The Respondent asserts that as he continued to search the lower half of Pena's body, he observed Pena's body turn, and to regain control, he grabbed either the back or side of Pena's head with one open hand and his body with the other. The question of whether the Respondent gratuitously slapped Pena in the face, or legitimately grabbed his head in order to control the suspect, is therefore a close one.

One point of reliance for the Department was that five witnesses said that the Respondent slapped Pena. That is not completely accurate, see infra, but nevertheless, it is the quality of the proof, not the quantity of witnesses, that is controlling. Cf. New York State Criminal Jury Instructions, 2d ed., "Credibility of Witnesses," p.1, para. 1.

In terms of ability to have observed the events, Pena was perhaps the best witness because the Respondent's hand made contact with his head. Yet the main difference between his testimony and that of the Respondent was that Pena said he swallowed a marijuana blunt, but the Respondent testified that he did not know what Pena was doing except that his body was

moving. Pena said that after he swallowed the blunt, he "got smacked." This was on his left cheek, and he believed it was an "open fist," i.e., the officer's palm hit his face. Pena did not use the term "slap," and he did not demonstrate the officer's action.<sup>4</sup>

Another credibility factor here is Pena's inconsistency with the rest of the witnesses, including the independent witness, school custodian James Foster, as to what object he disposed of. All of the other accounts had Foster throwing something away, not swallowing it. This was a significant discrepancy as to an important fact because if Pena did not throw an object, the Respondent would have had no reason to be concerned about his actions nor cause to grab his head and body to regain control. As the Respondent's counsel suggested, it is possible that Pena said it was a blunt because he recognized marijuana possession as being a lesser offense than that of cocaine. In any event, the episode cast doubt on Pena's credibility in general.

Pena did not identify any specific officer as the person that struck him. Of course, the Respondent's identity is not in question here, but still, Pena did not state whether or not the Respondent even observed him destroying evidence. This is critical because the Department's argument is that the Respondent struck Pena out of anger. If the Respondent did not see the act, he had no motive to gratuitously strike Pena.

Additionally, Pena testified that he was not injured. He did not go to the hospital. His brother, [REDACTED] confirmed that Pena was not injured. The Respondent testified that he was 5'11" and about 265 pounds. Pena testified that he was the same height but about 85 pounds lighter. In fact, [REDACTED] stated that he was surprised that the officer, whom he described as a big man, did not knock Pena unconscious. This is a significant detail because one would expect, if

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<sup>4</sup> Pena and Wilson were both incarcerated in state prisons at the time of trial. Thus, it is not surprising that neither was asked to give a standing physical demonstration of the force of the officer's contact with his face. The Court cites the lack of a demonstration not as a criticism of the Advocate, but simply to point out that Pena did not describe the "smack" beyond the fact that it was open-handed and to, he believed, the left side of his face.

the Respondent slapped Pena in the face with anger and force, Pena would have sustained some injury. The lack of injury supports the Respondent's account that he took police action by grabbing Pena's head and "quickly slammed it back onto the car."

The criminal record of a witness may also be examined when assessing credibility, see People v. Bermudez, 109 A.D.2d 674, 674-75 (1st Dept. 1985). Pena was incarcerated at the time of trial for Robbery in the Third Degree, and he had several other convictions on his record. He also testified that he used cocaine, marijuana and ecstasy, and was under the influence of marijuana at the time of this incident. He denied that marijuana use affected his memory, but admitted that it affected his memory while he was using it. This means, at most, that Pena had an accurate memory of an event that he experienced while under the influence of marijuana.

The fact that Pena did not file a civil action in response to this incident bolsters his credibility because he had no monetary motive to falsify, cf. Criminal Jury Instructions, 2d ed., "Credibility of Witnesses: Motive," p. 2. However, Pena did not make a prompt report about his treatment. It was his brother, [REDACTED] that made the original civilian complaint. One would expect a complaint after treatment like the kind described. Under the violent circumstances alleged by the Department here, Pena's lack of a prompt complaint outweighs the lack of his motive to falsify.

The Department's second witness was Steven Wilson, who worked with Pena and [REDACTED] and lived in an adjacent apartment. Wilson's testimony stood in starker contrast to the Respondent's. Wilson used the term "smack," but testified that the Respondent looked back toward where Pena threw the object before he "came back around" and struck him. This lent support to the Department's argument that the Respondent struck Pena in anger; he saw what Pena had done and struck him in response.

Like Pena, Wilson also was serving a state prison sentence at the time of trial. He admitted that he felt loyalty toward Pena, who along with [REDACTED] had given Wilson a place to live. Some of this loyalty may have been on display when Wilson was asked on cross-examination whether there was also a blunt on top of the car in addition to the crack pipe Wilson already testified about. Wilson answered, "No – yeah, I think so. I don't really know, you know, I am not going to say yes or no. Could have been." Although Wilson was clear that he never saw Pena place a blunt in his mouth, it appeared that Wilson was trying to avoid testifying that his friend had lied.

The Respondent's attorney also pointed out a discrepancy in how Wilson described the event. Wilson testified that the officer struck Pena while they faced each other. He said that the officer used the back of his right hand to hit the left side of Pena's face. When counsel demonstrated that this was unlikely because the officer would have had to twist his right hand up and back, Wilson admitted he was mistaken, and said that the officer used his left hand. The Respondent, therefore, argued that Wilson had not actually seen a slap, and was "making it up as he went along." At the very least, the questioning cast doubt on Wilson's opportunity to have seen and heard the events, or his ability to recall them accurately.

In other aspects, Wilson's testimony bolstered the Respondent's account. Wilson agreed with the Respondent's attorney that Pena's action happened quickly. Wilson agreed that the officer first hit Pena in the face then pushed "him with his other hand on the body to get control of him over the car." This is consistent with the Respondent's testimony that after grabbing Pena's head, he grabbed his body in order to gain control of a suspect whose movements he saw as a threat. It raises the possibility that Wilson saw the events but did not accurately describe or remember them. Moreover, if the Respondent needed to "get control of" Pena, it would mean

that he was out of control first. This is more consistent with the Respondent's account of a sharply-twisting suspect's body than it is with Wilson's account of a stunned officer who paused and violently reacted to an unthreatening individual. It should be minded, however, that here, the language used was suggested by the Respondent's attorney.

The third witness for the Department was James Foster. He was a school custodian who came forward, as the SNEU officers were leaving, to volunteer to Sanchez that he would give an official account of what he had seen. His testimony had significant differences with that of the Respondent. Foster's testimony was consistent with a gratuitous slap. Foster testified that the slapping officer was not the same officer that searched the individual. Foster said that a smaller officer was doing the searching, and that the individual had not yet been searched when he threw the object. In fact, Foster did not say specifically that the individual grabbed the object from the vehicle's hood before he threw it.

Foster also noted a pause before the officer struck the individual, saying, "He just he got shocked because he threw it against the wall. That's how it looked to me. Like, what? And he just smacked." Foster also stated that after the officer struck the individual, he grabbed him by the collar and lifted him high over the vehicle, before handcuffing him. This tended to negate the Respondent's account that he struck and grabbed Pena to control him. If the Respondent lifted Pena as Foster described, he would not have been controlling him, and his strike to Pena's head would not have been a valid police action to regain control.

However, other parts of Foster's testimony were less consistent with a slap borne of anger. He stated that after the officer hoisted the individual, "He was patting him on the shoulder like he was saying, you know, okay, calm down, take it easy, and then walked him to

the back of the car.” If the Respondent were angry enough to slap Pena in the face, it is hard to believe that he would have been so conciliatory straight afterward.

But Foster did not have the best vantage point. He viewed the events from the third floor of the school building, through a dirty window on a sunny day around noon. Nevertheless, Foster asserted that he was able to see as well as he could in the Trial Room. There was some glare on the car.

Other questioning of Foster cast further doubt on his opportunity to have seen and heard the events, or his ability to recall them accurately. He described counsel as 6’2” to 6’3”, and the Respondent as 6’4” to 6’5” and 350 to 375 pounds. Foster’s characterizations were as much as half a foot and over 100 pounds off for the Respondent. Moreover, his account of the Respondent lifting Pena high over the vehicle was unlikely because, as the Respondent pointed out, it would have been tactically unwise to do so. In fact, the Court cannot perceive of any reason he would have done so. Simply put, Foster had a tendency to exaggerate.

The Department also presented the hearsay accounts of the driver, [REDACTED], and the original civilian complainant, [REDACTED]. Although hearsay is admissible in this forum, see Matter of Ayala v. Ward, 170 A.D.2d 235 (1st Dept. 1991), there are significant reasons for caution in cases like this that present close questions of credibility. These accounts were not central to the Department’s case in the sense that there were in-court witnesses testifying about the same events. Nevertheless, in light of the witnesses’ failure to testify, the Court cannot observe their demeanors, explore possible motives to lie, or assess the credibility of their accounts after the test of cross-examination. This is especially true here because [REDACTED]’s account was in stark contrast to the Respondent’s. [REDACTED] described the officer as slapping



Pena in the face, "real hard," after coming from around the vehicle and yelling, "you stupid crack-head motherfucker." That would not be consistent with valid police action.

Also, counsel for the Respondent did not have the opportunity to explore any issues of potential bias or hostility. The tenor of [REDACTED]'s interview was one of anger. He mentioned that while he had good relations with the uniformed Department members in his neighborhood, he wanted to see the officers involved in this incident lose their jobs.

Like Pena's testimony, [REDACTED]'s account was not necessarily inconsistent with that of the Respondent. [REDACTED] first used the term "smack," although something may have been lost in translation, as [REDACTED] spoke with a French accent. At one point, after the investigator used the word "slap," [REDACTED] used that word also. According to [REDACTED] Pena was upset at being slapped. He explained to the investigator, "you know how you react to something that you have no reason why they are doing it?" On the other hand, [REDACTED] stated that after the slap, Pena had no time to react, although he was moving and the officers had to hold him and push him onto the car before handcuffing him. This was consistent with the Respondent's testimony that it took one or two seconds from the time Pena began moving until he was forced back down to the vehicle. It is less consistent with a scenario in which the Respondent slapped Pena in a broad, long-arm, open-handed manner, and then had to re-adjust his position to bring Pena to the vehicle and handcuff him. In any event, [REDACTED] indicated that he did not even see all of the hand strike, and had to be informed later by [REDACTED] what had occurred.

The Respondent's testimony, as a whole, was candid. He forthrightly admitted that he used force against Pena, but said that it was justified in light of Pena's action. The Respondent's testimony was more plausible than the accounts of those Department witnesses that claimed he slapped Pena in response to a perceived slight. Perhaps most notably, the Respondent's account

was corroborated by the fact that Pena was not injured. As noted supra, it is difficult to imagine how that could be if the Respondent slapped him in the way alleged by the Department. The Court concludes that the Department's witnesses observed the Respondent's hand make contact with Pena's head, but misinterpreted what the Respondent was doing.

As a party to the action, the Respondent was an interested witness. See People v. Agosto, 73 N.Y.2d 963, 967 (1989) (defendant is interested witness as a matter of law); Coleman v. New York City Transit Auth., 37 N.Y.2d 137, 142 (1975) (an actor in the transaction, having motive to shield self from blame, is an interested witness, even if not a party). But there are greater problems with crediting the accounts of the witnesses against the Respondent. Neither Wilson nor Foster was able to give an accurate description of what had occurred, and [REDACTED]'s account to the CCRB could not be examined and tested in court.

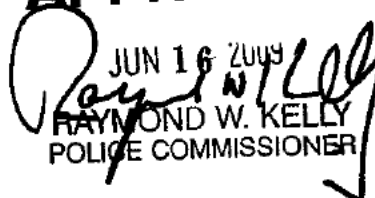
The Court concludes that the Department failed to prove that the Respondent used excessive force. Accordingly, the Court finds the Respondent Not Guilty.

Respectfully submitted,



David S. Weisel

Assistant Deputy Commissioner – Trials

**APPROVED**  
JUN 16 2009  
  
RAYMOND W. KELLY  
POLICE COMMISSIONER